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No. 09-174

In The
Supreme Court of the United States

ANDREW D. GLOGOWER,

Petitioner,

v.

SHARON P. CLARK, Liquidator of National Business Association Trust and National Benefit Administrators,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The National Association of Insurance Commissioners ("NAIC") respectfully moves this Court, pursuant to Rule 37.2(b), for leave to file a brief as *amicus curiae* in this case in opposition to the Petition for a Writ of Certiorari, and in support of its motion states:

1. Counsel of record for the NAIC attempted to obtain the consent of all parties to the filing of an *amicus curiae* brief by the NAIC by contacting the parties' counsel of record.

2. The Respondent, Sharon P. Clark, has consented to the filing of an *amicus curiae* brief by the NAIC through counsel of record, Greg E. Mitchell Esq.

3. The Petitioner, Andrew D. Glogower, through counsel Kathi Mann Sandweiss, did not consent to the filing of an *amicus curiae* brief by the NAIC, although the Petitioner's Petition for a Writ of Certiorari makes numerous references to the *amicus curiae* brief filed by the NAIC during the Ninth Circuit's consideration of this case.

4. The NAIC has a strong interest in this case as set out fully in the brief submitted with this motion because the case concerns the interests of the states in regulating insurer insolvencies and enforcing resulting state court action.

5. The interest of the NAIC is implicated when federal bankruptcy proceedings are enmeshed with an insurer insolvency, which states are entitled to regulate under the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011, *et seq*.

6. As the representative of the coordinated and considered views of the state government officials that regulate and enforce the insurance laws of the country, the NAIC is uniquely qualified and situated to apprise this Court of the potential national impact if state insolvency courts are not granted due deference in related bankruptcy proceedings.

WHEREFORE, the National Association of Insurance Commissioners respectfully moves this Court for leave to file the following brief as *amicus curiae* in support of the Respondent.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

1. IDENTITY OF *AMICUS CURIAE*

The National Association of Insurance Commissioners ("NAIC") is a not-for-profit Delaware corporation whose membership consists of the chief insurance regulatory officials of each state, the territories and insular possessions of the United States and the District of Columbia. Created in 1871, the NAIC is the nation's oldest association of state government officials. The mission of the NAIC is:

> [T]o assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost effective manner, consistent with the wishes of its members: promote the public interest; promote competitive markets; facilitate the fair and equitable treatment of insurance consumers; promote the reliability, solvency and financial solidity of insurance institutions; and support and improve state regulation of insurance. NAIC Mission Statement, http://www.naic.

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[1] No counsel for a party authorized this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae's* intention to file this brief.

org/index_about.htm (last visited October 6, 2009).

The NAIC's purpose is to provide its members with a national forum enabling them to work cooperatively on regulatory matters that transcend the boundaries of state jurisdictions. Collectively, the state insurance commissioners work to develop model legislation, rules, regulations, white papers and actuarial guidelines that promote and establish uniform regulation. Their overriding objectives are to protect consumers as well as assist in maintaining the financial stability of the insurance industry.

Any member of the NAIC may request the filing of an *amicus curiae* brief. All such requests require approval by the NAIC's Executive Committee. The Executive Committee has approved the filing of this *amicus* brief in opposition to the Petition for Writ of Certiorari.

2. INTEREST OF *AMICUS CURIAE*

The members of the NAIC have an interest in the continued strength of state-based regulation of insurer insolvencies. The Respondent, Sharon P. Clark, is the Commissioner of Insurance for the Kentucky Department of Insurance. The Petitioner's bankruptcy proceedings are enmeshed with the efforts of Commissioner Clark in regulating an insurer insolvency and going through the appropriate state court process to protect consumers. It is of great concern to the NAIC's members to see these efforts potentially

undone without due regard for state insurance regulation.

Each NAIC member promotes the objective of solvent insurance institutions. NAIC members act as the chief insurance regulator in each state and as the officer charged with handling insurer receiverships for the state. Individually and collectively, the NAIC's members and the state agencies over which they preside have a wealth of experience in the regulation of insurer insolvency. The NAIC's members understand the interests of insurance consumers and others affected by the consequences of an insurer insolvency, and work daily to protect those interests. The NAIC's members are uniquely qualified and situated to assist this Court by representing the regulatory and public policy concerns involved in this case.

Furthermore, this case implicates the primacy of the states in regulating insurance insolvency. The members of the NAIC are charged with the responsibility of regulating the business of insurance within their jurisdictions pursuant to the McCarran-Ferguson Act of 1945 ("the McCarran-Ferguson Act"), 15 U.S.C. § 1011, *et seq.*, and state insurance laws. The NAIC has extensive experience with the interpretation and application of the McCarran-Ferguson Act. The United States Supreme Court has stated that "[t]he views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979).

As this brief will discuss, the McCarran-Ferguson Act establishes that state regulation of insurance, including state insolvency proceedings, are not displaced by the federal bankruptcy laws. The two systems can operate side by side, as they did in this case to produce an appropriate outcome. The federal bankruptcy courts are responsible for applying federal bankruptcy law, and this can be achieved while giving due deference to factual issues determined in the course of state insolvency proceedings.

Finally, the Petitioner's Petition for Writ of Certiorari makes numerous references to the *amicus curiae* brief filed by the NAIC during the Ninth Circuit consideration of this case. Although the Petitioner has withheld consent for the NAIC to file an *amicus curiae* brief in opposition to his Petition, the NAIC certainly has an interest in clarifying the Petitioner's characterization of the NAIC's previous arguments.

The NAIC supports the Ninth Circuit's analysis, including consideration of the decision of the Franklin Circuit Court of the Commonwealth of Kentucky (Kentucky Circuit Court) regarding an important issue of fact; specifically, that the National Business Association Trust ("NBAT") and National Benefit Administrators ("NBA") constituted a single entity. This finding established an express trust as to both entities for purposes of determining fraud or defalcation while acting as a fiduciary under federal bankruptcy laws. The NAIC seeks to aid the United States Supreme Court by offering the legal position

and public policy perspectives of our association and NAIC member states.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit was correct in holding that certain bonus and loan payments the Petitioner made to himself from NBA, the administrative arm of his self-funded insurance trust, were not dischargeable in bankruptcy. In making this determination, the Ninth Circuit gave full faith and credit to a Kentucky state court decision holding that NBA and NBAT constituted a single entity.

Due deference to the state court's factual finding is necessary in order to preserve state authority to regulate the business of insurance. The authority was expressly granted by the McCarran-Ferguson Act, which sets forth specific and limited conditions for any kind of preemption by federal law. United States Supreme Court precedent provides that insolvency falls within the "business of insurance" for purposes of state authority.

The Ninth Circuit's decision in this case effectively balanced the authority of the federal government over bankruptcy proceedings with the autonomy of the states to regulate the business of insurance, including insolvency regulation. Had the Ninth Circuit chosen to ignore the state court's factual findings, the rights of all states to regulate

insurer insolvency, and assign personal liability where appropriate, would have been badly compromised.

ARGUMENT

1. The states have clear authority to regulate the business of insurance.

The NAIC adopts the Statement of the Case as set forth by Respondent Sharon P. Clark, Liquidator of NBAT and NBA. The Petitioner was the chairman of the board and chief executive officer of NBA. *See Glogower v. Miller*, 2007 WL 1577880, *1 (D.Ariz. May 31, 2007). NBA was the administrator of NBAT, with authority to market NBAT coverage, to set and collect premiums, to adjust and settle claims, and to otherwise transact the business of NBAT. *See id.* NBAT provided self-funded health insurance coverage to employers in 21 states, including the Commonwealth of Kentucky. *See* Opening Brief for Appellant at 8, *Miller v. Glogower*, No. 07-16188, (9th Cir. Jan. 25, 2008). The NAIC joins Kentucky in its characterization of NBAT as a multiple employer welfare arrangement ("MEWA") subject to state regulation. *See id.* at 36. NBAT paid NBA twenty percent of all contributions to the trust as an administrative fee. *See id.* at 9. In 1988, the Petitioner approved a promissory note from NBA to himself for "accrued but unpaid salary." *See Glogower v. Miller*, 2007 WL 1577880, *1. NBA made loan payments on this

promissory note in the total amount of $395,000 from 1989 to 1990. *See id.* The Petitioner also approved a bonus payment of $362,282.70 from NBA to himself in 1989. *See id.*

The NAIC and its member states have extensive experience with MEWAs like NBAT/NBA. Under the Employee Retirement Income Security Act ("ERISA"), states have the primary responsibility to regulate the fiscal soundness of MEWAs and to license their operators. *See* 29 U.S.C. § 1001, *et seq.*; 29 U.S.C. § 1002(40); 29 U.S.C. § 1144(b)(6)(A). MEWAs generally are plans or other arrangements that provide health and welfare benefits to the employees of two or more employers, and as such resemble unlicensed group insurance carriers. The reasons for state regulation of MEWAs can be found in the report issued by the United States General Accounting Office ("GAO"), U.S. GEN. ACCOUNTING OFFICE, PRIVATE HEALTH INSURANCE: EMPLOYERS AND INDIVIDUALS ARE VULNERABLE TO UNAUTHORIZED OR BOGUS ENTITIES SELLING COVERAGE, 312 (2004). In this report, the GAO identified 144 entities not authorized to sell health benefits coverage from 2000 through 2002. These unauthorized entities covered at least 15,000 employers and more than 200,000 policyholders, and left at least $252 million in unpaid medical claims. Many of these entities took the form of self-funded employer health plans like NBAT/NBA, but were later determined to be unauthorized MEWAs subject to state solvency regulation.

On June 20, 1991, the Kentucky Circuit Court ruled that NBAT was an unauthorized insurer doing business in Kentucky. *See Glogower v. Miller*, 2007 WL 1577880, *1. In the same ruling, the Kentucky Circuit Court found that NBAT was insolvent and ordered its liquidation. *See id.* On May 10, 1995, the Kentucky Court ruled that NBAT acted through and as one with NBA. *See Wright v. National Business Association Trust*, No. 90-CI-01207, (Franklin Cir. Ct. Ky. May 10, 1995). The Kentucky Circuit Court reasoned that NBA had sole control of management of NBAT; that NBAT had no offices or operations other than those provided by NBA; and that NBAT had no employees or officers other than the Petitioner. *See id.* Since NBA was financially dependent on NBAT, the Kentucky Circuit Court held that NBA was also insolvent. *See id.* This analysis established that NBA and NBAT functioned as a "single entity."

The corporate structure of NBA and NBAT is an important issue because it controls the question of whether the Petitioner's transfers from NBA constituted fraud or defalcation under the Bankruptcy Code. *See* the Bankruptcy Act of 1978, 11 U.S.C. § 101, *et seq.*; 11 U.S.C. § 523(a)(4). The corporate structure is also determinative as to whether the Petitioner was a fiduciary under the ERISA. The Ninth Circuit recognized the fiduciary relationship arises from an express or technical trust. *See In re Glogower*, 320 Fed.Appx. 809, 811 (C.A.9 April 3, 2009). NBAT was an express trust and an ERISA

plan. If NBAT and NBA constituted a single entity, as the Kentucky Circuit Court and the Ninth Circuit have both held, then the loan payments and bonus payments constitute "fraud or defalcation while acting in a fiduciary capacity" under 11 U.S.C. § 523(a)(4) and are not dischargeable. *See id.* at 812.

This leaves the Petitioner with few avenues other than to make a broad assertion that the United States Bankruptcy Code necessarily excludes or displaces all state insolvency proceedings. However, the history of insurance regulation in the United States reveals a much more complex relationship between federal and state law. In this case, there is no specific state law conflicting with federal bankruptcy law. The NAIC disputes the Petitioner's "all or nothing" approach suggesting that only the Commonwealth of Kentucky or the federal government can prevail in this case. To the contrary, the Ninth Circuit's decision applied provisions of the bankruptcy code in light of facts established in the course of state insolvency proceedings, achieving a balance of debtor, regulator and consumer interests. To have ignored the Kentucky Circuit Court's factual conclusions would have flown in the face of 64 years of clear Congressional support for state-based insurance regulation.

A. The passage of the McCarran-Ferguson Act was a clear and deliberative action whereby Congress authorized the continuing regulation of the business of insurance by the states.

The McCarran-Ferguson Act was enacted in 1945 to subject the business of insurance to the laws of the several states. *See* 15 U.S.C. § 1012(a). The statute accomplishes this by "revers[ing] the doctrine of preemption in cases involving state insurance laws, such that a state law specifically regulating the business of insurance . . . preempt[s] a conflicting federal law unless that federal law specifically relates to the business of insurance." *Blackfeet National Bank v. Nelson*, 171 F.3d 1237, 1244 (11th Cir. 1999) (citing *U.S. Dept. of the Treasury v. Fabe*, 508 U.S. 491 (1993)). Under the McCarran-Ferguson Act, federal statutes enacted pursuant to Congressional Commerce Clause powers "cannot preempt state insurance laws unless the federal statute explicitly provided for such preemption." *Greene v. U.S.*, 440 F.3d 1304, 1311 (2006).

Courts have, over time, developed tests to determine whether state insurance laws survive this reverse preemption test.[2] The United States Supreme Court addressed this issue in *Humana v. Forsyth,* 525

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[2] *See Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1129 (1999); *see Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co. Inc.*, 50 F.3d 1486, 1489 (9th Cir. 1995), *cert. denied*, 516 U.S. 964 (1995).

U.S. 299 (1999). The Court determined that state law continued to govern where: (1) the state law was enacted "for the purpose of regulating the business of insurance;" (2) the federal law does not "specifically relat[e]s to the business of insurance;" and (3) the federal law would "invalidate, impair or supersede" state law. *Id.* at 307. Since *Humana*, courts have consistently applied this three-part analysis.

The NAIC is not presenting an argument that any specific state law takes precedence over federal bankruptcy laws in this case. The Petitioner is the only party arguing for preemption. However, it must be noted the Petitioner's assertion that "typical principles of res judicata and full faith and credit give way to the primacy of federal law" in the context of bankruptcy is completely refuted by the reverse preemption aspect of the McCarran-Ferguson Act. NBAT provided self-funded health insurance, subject to state insolvency proceedings that assigned personal liability to the Petitioner. The Petitioner's attempt to discharge that liability in bankruptcy brings the autonomy of the states in this area directly into consideration. As the reverse preemption mechanism in McCarran-Ferguson makes clear, it is not permissible to dismiss a state's interest in the regulation of insurance solely because a federal law comes into play.

In this case, it is neither permissible nor necessary to choose application of federal bankruptcy law to the detriment of state insolvency proceedings. There is no state law or regulation that presents a

conflict with bankruptcy law. There is only the analysis under 11 U.S.C. § 523(a)(4) – specifically, the determination of fraud or defalcation while acting in a fiduciary capacity. The analysis required certain factual findings that were readily at the disposal of the Ninth Circuit because the Commonwealth of Kentucky effectively managed the insurer insolvency. Again, these two systems functioned correctly and in tandem, resulting in the Ninth Circuit's ruling.

B. This primacy extends to insurer insolvency, which is a separate process from bankruptcy with its own consequences and findings of fact.

Another factor that supports the Ninth Circuit's deference to the Kentucky Circuit Court is the very nature of insolvency. It is well established that insurer liquidation and insolvency is an entirely separate process from bankruptcy. Federal bankruptcy laws provide that a person may not be a debtor under the bankruptcy code if such person is a domestic insurance company. *See* 11 U.S.C. § 109(b)(2). The U.S. Court of Appeals for the Fourth Circuit cited widely accepted reasoning for this provision:

> No reasons for making these exceptions were assigned by the committees of Congress, but they may be surmised to lie in the public or quasi public nature of the business, involving other interests than those of creditors, in the desirability of unarrested operation, *the completeness of state regulation, including*

> *provisions for insolvency*, and the inappropriateness of the bankruptcy machinery to their affairs.

In re Supreme Lodge of the Masons, 286 F. 180, 184 (D.C.Ga. 1923) (emphasis added).

The United States Supreme Court ruled that proper procedures and rules for liquidation of insurance companies are issues to which "the Supreme Court of [each] state will speak with ultimate authority". *Clark v. Williard*, 292 U.S. 112, 123 (1934). The *Fabe* case further clarified the autonomy of states to regulate insurer insolvencies following adoption of the McCarran-Ferguson Act. *See Fabe*, 508 U.S. at 508. In this preemption case, the United States Supreme Court established that state insolvency laws related to the business of insurance to the extent such laws protect policyholders, rejecting prior arguments that insolvency laws did not relate to the "business of insurance" because the insurer is no longer conducting business following insolvency. *See id.*

Other advantages to placing the liquidation of insurance companies squarely within the purview of the state insurance regulators include judicial economy, ease of administration, and the states' interest in protecting the public. *See Sims v. Fidelity*, 129 F.2d 442, 448-9 (4th Cir. 1942). When the rights of policyholders are at stake, deference must be paid to the expertise of state insurance departments in liquidation proceedings and issues of insolvency.

State proceedings are ideal to manage insurer insolvency because they are flexible and responsive to different situations. To address the issues of a troubled company, a state can use pre-receivership tools such as administrative supervision or seizure, or it can proceed with conservation, rehabilitation or liquidation. *See* NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, RECEIVERS HANDBOOK FOR INSURANCE COMPANY INSOLVENCIES, 1-36 (2009). If a state court rules that liquidation is appropriate, the ensuing order will cancel the policies at hand, stay actions pending against the insolvent insurer, and require that all creditors be provided with a proof of claim form. *See* Davis J. Howard, *How to Fail at Liquidating an Insurance Company Without Really Trying; Appoint a Policyholders' Committee*, 39 FED'N OF INS. & CORP. COUNS. Q. 31, 34 (1988). This process is entirely separate from bankruptcy, to the point where "the very concept of analogizing any type of insurance company delinquency proceeding to a bankruptcy proceeding is inappropriate." *Id.* at 56.

Clearly, state insurance regulators are best equipped to handle insurer insolvencies. The insolvency of NBA/NBAT is entwined with the Petitioner's bankruptcy proceedings. The question of dischargeability for the bonus and loan payments cannot be determined in a vacuum. The state insolvency proceedings were soundly within the purview of the Kentucky Circuit Court, and the resulting factual findings were properly incorporated into the Ninth Circuit's analysis.

2. The Ninth Circuit acted appropriately in giving full faith and credit to the Kentucky Circuit Court ruling, which included an important factual determination of the "single entity" nature of NBAT and NBA.

As this case has progressed, the NAIC has supported the Respondent's position that deference must be paid to the factual findings of the Kentucky Circuit Court during insolvency proceedings for NBAT. The personal liability assigned to an individual in the course of insolvency proceedings is relevant to that individual's bankruptcy disposition. The Petitioner argues that deference to the Kentucky Circuit Court ruling is inappropriate because the Kentucky Circuit Court did not consider § 523(a)(4) and because its ruling did not apply the "single entity" issue to any bankruptcy laws. This is faulty reasoning. The Kentucky Circuit Court's role was to examine the corporate structure of NBA/NBAT for purposes of insolvency. The Ninth Circuit's role was to interpret § 523(a)(4) for purposes of the bankruptcy. Each court achieved its purpose, and there is no reason why one ruling has to be dismissed in favor of the other.

The Ninth Circuit's ruling upheld the Bankruptcy Court's determination that the Petitioner was an ERISA fiduciary, and therefore a fiduciary for purposes of § 523(a)(4). *See Glogower*, 320 Fed.Appx. at 811. The Petitioner's own admission that NBAT was an ERISA plan was part of this analysis. *See id.* The Ninth Circuit concluded that Petitioner's total

control over NBA, the administrative account, adhered to ERISA's provision that a fiduciary exercises discretionary authority or discretionary control respecting management of the plan. *See id.* at 812. The Court invoked the Kentucky Circuit Court decision as to one factual issue; specifically, that NBAT and NBA were one and the same entity. *See id.* It is disingenuous for the Petitioner to assert that this deference on a fact issue "exalts Kentucky state insurance regulations over federal bankruptcy law."

It is the function of the bankruptcy courts to determine dischargeability using all the facts at their disposal. The fact that NBA/NBAT constituted a single entity established that the Petitioner was a fiduciary with respect to bonus and loan payments. The finding extended the Petitioner's clear fiduciary status from NBAT to NBA. It was entirely appropriate for the Ninth Circuit to look to the Kentucky Circuit Court for guidance on this issue; quite simply, it was the only fact finder in the case's history that took up the question.

If the Ninth Circuit had failed to give full faith and credit to the Kentucky Circuit Court's determination, it would have nullified the painstaking efforts NAIC members have taken to regulate unauthorized insurers and to craft a uniform regulatory system of insolvency and liquidation. The Court's deference to the Kentucky Circuit Court's ruling

allowed state insolvency proceedings the recognition that is due under the McCarran-Ferguson Act.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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